Supreme Court, U.S.
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No. 92-732

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GULF STATES STEEL, INC. OF ALABAMA,
Petitioner,

v.

THE LTV CORPORATION, LTV STEEL COMPANY, INC., and GULF STATES STEEL CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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Questions Presented

1. Did the Court of Appeals correctly apply established Ohio law to the undisputed facts in determining that petitioner's indemnity claims under a contract were barred by petitioner's failure to give the contractually required notice?

2. Did the Court of Appeals correctly hold that petitioner could not avoid its contractual obligation to pay interest on a note after default by depositing disputed monies into escrow pursuant to Fed. R. Civ. P. 67 rather than tendering the full and unconditional payment required by Ohio law?

Statement Pursuant to Rule 29.1

Respondent The LTV Corporation has no parent company, and is the parent company of respondents LTV Steel Company, Inc. and Gulf States Steel Corporation. The direct and indirect subsidiaries of the respondents (other than wholly owned subsidiaries) are listed below under the names of the respondents:

The LTV Corporation
- Composite Materials Characterization, Inc.
- Elastomeric Actuators, Inc.
- L-S Electrogalvanizing Company
- Petroequip
- Vought Arabia
- Also Subsidiaries of LTV Steel Company, Inc. Listed Below

LTV Steel Company, Inc.
- Apieco Assurance Ltd.
- Black River Lime Company
- L.A.S. Resources, Inc.
- L-S II Electrogalvanizing Company
- Northern Land Company
- Olga Coal Company
- Presque Isle Corporation
- Processing Technology, Inc.

Gulf States Steel Corporation
- None

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BRIEF FOR RESPONDENTS IN OPPOSITION

This is a contract case, although one would not know it from reading the petition for certiorari. Petitioner ("GSSI") entered into a contract with respondents (collectively "LTV") on January 31, 1986. Pursuant to that contract, which is governed by Ohio law, LTV transferred the assets of a steel mill to GSSI and agreed to indemnify GSSI for pre-closing (as opposed to post-closing) liabilities or obligations if given timely notice as required by the contract. The Court of Appeals, applying established Ohio precedent, held that the undisputed facts

established that GSSI had failed to give LTV the notice to which it was entitled under the contract.

Statement of the Case

LTV was required to sell a steel mill in Gadsden, Alabama pursuant to a consent decree, entered on August 2, 1984, which was negotiated to settle a civil antitrust suit. *United States* v. *LTV Corp.*, 1984-2 Trade Cas. (CCH) ¶ 66,133 (D.D.C.) (Pet. 67a-109a[1]), *appeal dismissed*, 746 F.2d 51 (D.C. Cir. 1984). In that consent decree, the Department of Justice and LTV agreed that if LTV was unable to find a buyer within a certain amount of time, a trustee would be appointed who would have the power to sell the Gadsden steel mill "on such terms as are then obtainable" (Pet. 98a). On December 17, 1985, the trustee recommended, and the District Court approved, a proposed contract to sell the Gadsden steel mill to GSSI, subject to any "modifications as may be agreed to by LTV and [GSSI] and approved by the Trustee and, if material to the viability of Gadsden, by the Department of Justice" (Pet. 114a). LTV and GSSI subsequently negotiated changes in the proposed contract, which resulted in LTV's withdrawal of its appeal of the December 17, 1985 order. The final contract between GSSI and LTV, the Agreement of Purchase and Sale of Assets ("Asset Agreement") (JA73-125), closed on January 31, 1986. The contract is governed by Ohio law (JA120).

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1. "Pet." citations are to the petition for certiorari, and "JA" citations are to the joint appendix in the Court of Appeals.

The contract provided that the assets of the Gadsden steel mill were transferred "as is and where is" (JA97). The seller, LTV, agreed to indemnify the purchaser, GSSI, for liabilities or obligations arising "out of the conduct of Business *on or before* the Closing Date" of January 31, 1986 (JA107 (emphasis added)). (GSSI, in turn, agreed to indemnify LTV for any costs or expenses resulting from "the Assets or [GSSI's] use thereof *after* the Closing Date" or "the conduct of the Business *after* the Closing Date" (JA108 (emphasis added)).) As a condition precedent to this indemnity provision, GSSI was required by the contract to give LTV prompt notice of any actions, suits or proceedings for which indemnification would be sought; to offer full authority to defend any such proceedings; and to give written notice of the amount and circumstances of any claim (JA108-109).

In payment of the purchase price of the assets of the Gadsden steel mill, GSSI gave LTV a 10-year promissory note (the "Note") for $38.5 million, the cost of the inventory at the steel mill (JA20-31; *see* JA82). GSSI was required under the Asset Agreement to hire an investment banker to fix an interest rate reflecting the risk involved in the Note (JA84-85). Because the Note was unsecured and subordinated, required no down payment, and did not call for principal payments until three years after closing, the interest rate resulting from this process was 16¾%, plus an additional 2% after maturity or default (JA20-21).

GSSI paid on the Note without protest from August 1, 1986 until February 1, 1991. On February 1, 1991, GSSI defaulted, owing $31,293,000 under the Note (Pet. 44a). On February 4, 1991, LTV, which is in bankruptcy, filed an adversary proceeding against GSSI in the United States Bankruptcy Court for the Southern District of New York for the balance

due under the Note (JA12-19). On May 3, 1991, the United States District Court for the Southern District of New York issued an order withdrawing the reference from the Bankruptcy Court and transferring the proceeding to the United States District Court for the District of Columbia (Pet. 65a-66a).

GSSI moved under Fed. R. Civ. P. 67 to deposit the amount then due to LTV under the Note into escrow in order to stop the accrual of additional interest at the 18¾% rate provided in the Note and the Asset Agreement (JA35). LTV opposed this motion on the ground that it was contractually entitled to interest at 18¾% until LTV received payment. On June 21, 1991, the District Court entered an order providing that upon deposit into escrow by GSSI of the amount due on the Note, plus interest to that date, accrual of interest would be terminated and "[a]ny remaining obligation of GSSI to LTV . . . [would be] satisfied and paid in full" (Pet. 43a-44a).

On July 1, 1991, the District Court issued an order holding that GSSI was "not precluded as a matter of law from receiving a recoupment, no greater than the amount held in escrow, . . . for the costs it has incurred in correcting environmental violations that arose 'directly or indirectly out of the conduct of Business on or before the Closing Date which is not an Assumed Liability'" under the Asset Agreement (Pet. 57a). An evidentiary hearing to determine which, if any, of the costs claimed by GSSI were LTV's obligation under the Asset Agreement was held on August 26 and 27, 1991 (Pet. 29a). On December 5, 1991, the District Court issued its final order granting GSSI almost all of the amounts it sought (Pet. 41a-42a), accompanied by findings of fact and conclusions of law (Pet. 28a-40a) which were copied substantially verbatim from GSSI's proposed findings and conclusions (*compare* JA323-353 *with* JA400-414).

The Court of Appeals reversed in a unanimous opinion by Circuit Judge Wald, joined by Circuit Judges Williams and Randolph. *LTV Corp.* v. *Gulf States Steel, Inc. of Alabama*, 969 F.2d 1050 (D.C. Cir. 1992) (Pet. 1a-27a). The Court of Appeals held that under the unambiguous terms of the contract GSSI was required to give LTV "prompt notice . . . of the institution of any actions, suits or proceedings and demands" made against GSSI in time to permit LTV to "defend, adjust, compromise or settle" the same (Pet. 12a-13a). The purpose of this requirement — which Ohio law considers to be "of the essence of the contract" — is to permit the potential indemnitor a role in settling or disputing claims for which it ultimately would be responsible (Pet. 13a). Under Ohio law, failure to give such notice precludes any claim for indemnity unless the claimant can rebut the presumption of prejudice (Pet. 14a). The Court of Appeals examined the record in detail and found it bereft of any evidence that GSSI had complied with the specific notice provisions of the contract (Pet. 15a-23a). Thus, the Court held that under Ohio law "GSSI's failure to give notice precludes its claim for indemnification" (Pet. 23a-24a).[2] The Court further determined that the District Court had erred in permitting GSSI's deposit into escrow under Fed. R. Civ. P. 67 to alter the terms of the contract between GSSI and LTV by substituting a lower treasury bill rate of interest for the

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2. The Court did not reach the alternate ground for decision urged by LTV that the expenditures claimed by GSSI arose from the use of the steel plant and the conduct of the business after closing on January 31, 1986, and thus were GSSI's responsibility under the Asset Agreement (Pet. 24a n.8).

rate to which the parties had agreed in the Note and Asset Agreement (Pet. 24a-27a).

GSSI's petition for rehearing and suggestion for rehearing *en banc* were denied without opinion on July 28, 1992 (Pet. 120a).

Reasons for Denying the Writ

I. The Court of Appeals was not asked to, and did not, modify the consent decree but merely applied a contract between the parties to the undisputed facts pursuant to established Ohio law

GSSI argues that the Court of Appeals' application of the express terms of the January 31, 1986 Asset Agreement somehow acted to modify "de facto" the antecedent August 2, 1984 antitrust consent decree "without even facial compliance with Federal Rule of Civil Procedure 60(b)" as interpreted by this Court last Term in *Rufo* v. *Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992) (Pet. 15-16).[3]

GSSI did not make this argument below. GSSI even failed to raise this argument in its post-argument submissions to the Court of Appeals, including GSSI's 12-page Post-Argument Memorandum of Supplemental Authorities dated May 13, 1992 and its 15-page Petition for Rehearing and Suggestion for Rehearing en Banc dated July 10, 1992.

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3. GSSI articulates no reason why this Court should now revisit issues dealt with at length in the *Rufo* case only last Term.

In any case, the argument is meritless. Because this case does not involve modification of a consent decree, neither *Rufo* (which involved modification of a consent decree regarding the housing of inmates in a county jail) nor Rule 60(b) has the slightest application here. This case involves the January 31, 1986 Asset Agreement, not the antecedent August 2, 1984 consent decree.

GSSI's answer did not allege any claim for recoupment based on the consent decree; instead, it relied upon the Asset Agreement (*see* JA164-166). The July 1, 1991 order of the District Court unambiguously framed the issue for the evidentiary hearing as the scope of LTV's indemnity obligation under the Asset Agreement (Pet. 57a-58a). The only issue tried at the evidentiary hearing was GSSI's entitlement to indemnity under the Asset Agreement (Pet. 29a).

Moreover, the consent decree expressly authorized the parties to negotiate the Asset Agreement. The consent decree provided that divestiture would take place "on such terms as are then obtainable" (Pet. 98a). The December 17, 1985 order approving a draft contract presented by GSSI expressly provided that the final contract could contain "such other modifications as may be agreed to by LTV and [GSSI] and approved by the Trustee and, if material to the viability of Gadsden, by the Department of Justice" (Pet. 114a). The Asset Agreement itself expressly recognized that the negotiated modifications from the earlier draft were authorized and provided for by the Court's order (JA115). GSSI voluntarily signed the Asset Agreement without objection by the trustee, the Department, or the District Court.

Thus, LTV did not seek, and the Court of Appeals did not consider, any "modification" of the earlier consent decree.

Under well-settled principles, GSSI may not interpose the prior consent decree to avoid its contractual obligation to pay the purchase price of the assets it acquired under the Asset Agreement. A party cannot enter a contract, and then defend against a breach of contract claim by claiming that the contract violated a prior consent decree. *Allen-Myland, Inc.* v. *IBM Corp.*, 746 F. Supp. 520, 551-52 (E.D.Pa. 1990); *May Department Stores Co.* v. *First Hartford Corp.*, 435 F. Supp. 849, 852-54 (D. Conn. 1977). As this Court has emphasized, in words not inapposite to this case, "[p]ast the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the [Sherman] Act, the courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, 'of preventing people from getting other people's property for nothing when they purport to be buying it.'" *Kelly* v. *Kosuga*, 358 U.S. 516, 520-21 (1959) (quoting *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U.S. 227, 271 (1909) (Holmes, *J.*, dissenting)).

GSSI makes several other erroneous arguments. GSSI contends that its petition presents issues involving the intersection of the bankruptcy, environmental, and antitrust laws (Pet. 14-15). It does not. The only issue in this case is the proper application of an unambiguous contract under Ohio law.

GSSI argues that "[a]t a minimum, the views of the United States, a party to the Final Judgment [*i.e.*, the August 2, 1984 consent decree, to which GSSI was not a party], and the State of Alabama, a beneficiary thereof, should have been solicited" (Pet. 16). However, GSSI concedes that the United States declined to participate below (Pet. 16, 202a-203a), and that Alabama was permitted to participate as *amicus curiae* in both the District Court and the Court of Appeals (Pet. 17).

GSSI argues that the Court of Appeals misinterpreted the scope of GSSI's obligations under the Asset Agreement (Pet. 17-18). On the contrary, the Court of Appeals correctly construed the unambiguous language of the Asset Agreement under Ohio law (*see* Pet. 12a-24a).[4]

Finally, GSSI suggests that the Court of Appeals erred in not deferring to the District Court's experience in the case (Pet. 18-20). This argument ignores the fact that the issue before the Court of Appeals was one of contract interpretation and application, not discretion. The standard of review applicable to contracts is not altered by the fact that the District Judge may have had prior experience with the litigants in the case or that the contract was negotiated pursuant to a consent decree. *Cf., e.g., United States* v. *Western Elec. Co.*, 900 F.2d 283, 294 (D.C. Cir.), *cert. denied*, 111 S. Ct. 283 (1990); *Paralyzed Veterans of America, Inc.* v. *Washington Metro. Area Transit Auth.*, 894 F.2d 458, 460 (D.C. Cir. 1990). Moreover, where, as below, the District Court abdicates its duty to provide a reasoned explanation for its decision and instead merely copies the submissions of one party, the District of Columbia Circuit quite appropriately reviews the record

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4. In another new argument, GSSI disingenously contends that a 1990 brief by LTV regarding what constitutes a pre- or post-petition "claim" under the Bankrupty Code should somehow control interpretation of the Asset Agreement (Pet. 18). The definition of a "claim" in the Bankruptcy Code, however, is very specific and involves congressional policy concerns that have no application to interpretation of a private contract. Indeed, the very brief cited by GSSI expressly notes that the bankruptcy definition of "claim" differs from the non-bankruptcy definition (Pet. 222a).

" 'with particular, even painstaking, care.' " *Berger* v. *Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1408 (D.C. Cir. 1988) (quoting *Southern Pac. Communications Co.* v. *AT&T*, 740 F.2d 980, 984 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985)), *cert. denied*, 490 U.S. 1105 (1989).

II. The Court of Appeals correctly refused to permit petitioner to evade its contractual obligation to pay interest through a misuse of Federal Rule of Civil Procedure 67

The Court of Appeals correctly held that the District Court erred when it permitted GSSI to use an escrow account under Fed. R. Civ. P. 67 to extinguish its contractual obligation to pay interest, after default, at the rate of 18¾% set by an investment banker hired by GSSI (Pet. 24a-27a). None of GSSI's three reasons why this Court should review this determination has the slightest merit.

GSSI's argument that the escrow deposit was not made pursuant to Rule 67 (Pet. 22-23) is insupportable. GSSI's original motion was to "deposit the money claimed due by LTV with the Court Registry pursuant to Federal Rule of Civil Procedure 67" (JA35; *see also* JA155-158). In argument before the District Court on the motion, GSSI's counsel stated unequivocally that "we [seek to make the deposit] pursuant to Rule 67" (JA231; *see also* JA233 (counsel for GSSI stated that deposit is authorized "under Rule 67 and the cases construing the rule")). The District Court's Order Regarding Deposit of Monies itself is clear that the order was made "[p]ursuant to Rule 67, Fed. R. Civ. P." (Pet. 43a).

GSSI's argument that the deposit did not impair LTV's rights under the contract (Pet. 23-24) is unsupported by fact or logic. As the Court of Appeals noted, during the pendency of

the District Court's order LTV was deprived both of the money due it under the Note and the legal rate of interest to which it was entitled under the contract and Ohio law (Pet. 25a-26a).

GSSI erroneously suggests that the Court of Appeals is the only federal court to hold that Rule 67 may not be used to avoid interest provided by contract (Pet. 25). In fact, federal courts have held, without exception, that Rule 67 escrow deposits may not be used to alter contractual obligations.[5] This limitation is also clear from the legislative history of the Rule,[6]

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5. *See Browning Ferris, Inc.* v. *Montgomery County*, 1990 WL 131937 (E.D. Pa. Sept. 4, 1990) (Rule 67 procedure "cannot be used as a means of altering the contractual relationships or legal duties of the parties"); *In re Dep't of Energy Stripper Well Exemption Litig.*, 124 F.R.D. 217, 221 (D. Kan. 1989) (same); *Prudential Ins. Co.* v. *BMC Indus., Inc.*, 630 F. Supp. 1298, 1300 (S.D.N.Y. 1986) (Rule 67 is a "procedural device" that is intended "to provide a place of safekeeping for disputed funds pending resolution of a legal dispute and not to provide a means of altering the contractual relationships and legal duties of each party."); *Blasini-Stern* v. *Beech-Nut Life Savers Corp.*, 429 F. Supp. 533, 534 (D.P.R. 1975) ("Nothing in this [R]ule [67] provides for the stopping of interest accrual upon deposit in court."); *see also Copelco Leasing Corp.* v. *Diagnostic Imaging Servs., Inc.*, 891 F.2d 77, 82 (5th Cir. 1989) (deposit into escrow does not extinguish obligation to pay interest).

6. As originally proposed in 1981, amended Rule 67 would have stopped the running of "interest imposed by statute or rule" on the date of deposit, but expressly provided that "[i]nterest imposed by the terms of a contract shall be unaffected by a deposit, except that any interest earned on money deposited in court shall be credited to that liability." Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 90 F.R.D. 451, 492 (1981). In the final amended rule, the Committee on Civil Rules omitted the provisions concerning the running of interest on the ground that "these substantive issues should be left for judicial resolution rather than made the subject of a rule." Amendments to the Federal Rules of Civil Procedure, 97 F.R.D. 165, 193 (1983).

and the rule of construction mandated by the Rules Enabling Act, 28 U.S.C. § 2072.[7]

Finally, GSSI wrongly suggests that the Court of Appeals decision is a denial of due process that somehow eviscerates Rule 67 as a procedural tool (*see* Pet. 25). The decision does not impair in any way the efficacy of Rule 67 as a procedural tool for payment of disputed sums into Court; it merely prevents the Rule from being misused as a device to cut off substantive contractual rights. In fact, GSSI could easily have avoided the risk here simply by making an unconditional tender to LTV of the full amount due and owing. Under Ohio law, such a tender would have stopped the running of interest. *See, e.g., Viock* v. *Stowe-Woodward Co.*, 569 N.E.2d 1070, 1073 (Ohio App. 1989). GSSI unsuccessfully gambled that it could deprive LTV of the use of the funds and, at the same time, avoid its contractual obligation to pay interest by depositing the funds into escrow. As the Court of Appeals recognized, any risk resulting from this gamble was the avoidable creation of GSSI:

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7. *See* 19 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4509, at 148 (1982 & Supp. 1992). GSSI's contention that the Court of Appeals erred in considering the Rules Enabling Act (Pet. 21 n.5) is factually specious and legally incorrect. *See, e.g., Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 391 (1990) (Rules of Civil Procedure are to be interpreted "according to [their] plain meaning, in light of the scope of the congressional authorization").

"GSSI chose to litigate the issue of LTV's liability rather than to pay LTV the amount due under the Note and then seek relief as a creditor in bankruptcy court. The risk that GSSI bore in failing to pay LTV the full amount, free and clear of any claims, was that it might lose on appeal and be forced to pay the full amount plus the default rate of interest expressly provided for in the Note. Some risks simply do not pay off." (Pet. 27a.)

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: November 16, 1992

Respectfully submitted,

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